

# ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA 08-577

JENNIFER A. SMITH

APPELLANT

V.

TREVOR W. SMITH

APPELLEE

**Opinion Delivered** January 28, 2009

APPEAL FROM THE LONOKE  
COUNTY CIRCUIT COURT,  
[NO. DR-2006-150]

HONORABLE BARBARA ELMORE,  
JUDGE

AFFIRMED

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**COURTNEY HUDSON HENRY, Judge**

Appellant Jennifer A. Smith appeals an order of the Lonoke County Circuit Court granting custody of the parties' minor children to appellee Trevor W. Smith. On appeal, appellant argues that the circuit court erred in awarding custody to appellee, as that ruling was contrary to the evidence and the best interest of the children. We affirm the circuit court's order.

Appellant and appellee were married on July 9, 1999, and the parties have two daughters: KS, born on December 9, 1999, and ES, born on September 14, 2002. Appellant also has an older son from a previous relationship. On February 27, 2006, appellant filed for divorce and alleged general indignities. On May 15, 2006, the circuit court entered an agreed temporary order in which appellant was awarded primary physical custody with liberal visitation to appellee. The agreed temporary order also required that appellee, a major in the

United States Air Force, pay \$1,268 in monthly child support and \$1,749 for the monthly mortgage and utilities, as well as \$600 in incidentals.

Within three months of the temporary order, appellee failed to pay the court-ordered support and expenses, and appellant claimed she was forced to file for bankruptcy protection as a result of appellee's nonpayment. On November 20, 2007, appellant moved the court to issue a show-cause order for appellee's failure to pay support. In her motion, appellant claimed that, rather than paying his court-ordered support, appellee continued to build and sell houses, make extravagant purchases, and traveled abroad with his girlfriend.

In response, on December 14, 2007, appellee filed a motion to change custody alleging that "the best interests of the children would be served by [appellee] having primary custody of the children because of [appellant's] wrongful conduct." In his motion, appellee made the following allegations: (1) appellant caused the children to miss an unreasonable number of school days; (2) appellant was arrested on an outstanding warrant for domestic battery and resisting arrest; (3) appellant's home was in such a "deplorable condition" that it was unable to be sold; (4) appellant frequently used marijuana; and (5) appellant established Myspace profiles for the children, thereby giving them access to appellant's Myspace page containing photos of her "drinking, kissing numerous men, [and] posing [provocatively]."

At the final hearing on January 7, 2008, the circuit court considered these matters. Appellant acknowledged that the children missed "a lot of school" while in her care. Appellant admitted to e-mailing nude pictures of herself to a male acquaintance. She also admitted to smoking marijuana with appellee. In addition, she admitted that she stole

appellee's girlfriend's real-estate signs. Appellant testified that appellee was suspended from coaching the children's basketball and soccer teams because of his cursing in front of the children. Appellant referenced the parties' "toxic relationship" in which physical violence began in February 2005. Appellee was convicted in September 2007 for choking appellant, and both parties went to jail because of the altercation. Further, the record reveals numerous instances where appellant engaged in criminal conduct. For example, at the hearing, Officer Renee Robinson testified that she was called to the parties' residence for a harassment report. Upon arrival, Officer Robinson found appellant in her vehicle blocking the roadway. When Officer Robinson conducted a warrant check, she learned that appellant had an active warrant for violating a no-contact order. Thereafter, Officer Robinson asked appellant to exit the vehicle, but instead, appellant attempted to drive away. When the officer pulled appellant out of the vehicle, a struggle ensued. As a result of the incident, appellant faced charges of harassment, resisting arrest, and disorderly conduct. Officer Robinson testified that, following the hearing, she would take appellant into custody for additional outstanding warrants for harassment and violation of a no-contact order.

The circuit court also heard testimony from appellee, who testified that, in lieu of paying monthly support, he paid appellant several thousand dollars from the sale of homes that the parties owned through a joint enterprise. He stated that appellant had filed for bankruptcy twice and "frivolously spends . . . money" and that his own financial situation was poor. With regard to appellant's behavior, appellee testified:

[Appellant] thinks it's okay to stay up all night and sleep all day. She thinks that school is not important. . . . She doesn't care who it is or where it

is, she will say and do anything. . . . She is emotionally unstable. She exposes these children to half clothed, naked photography of herself. There are some pictures that you still have on your desk where she's taking a half-nude photograph of herself. She does it so often. And her daughter's in the back of the picture right here, and doesn't even turn her head. . . . Emotionally, she exposes [the children] to this irrational behavior consistently. She is attacking. She's harassing. She's got disorderly conduct. She does it anywhere. She has a criminal record. She does drugs. She can't get these kids to school on time.

The circuit court heard evidence of appellee's improper behavior as well, including evidence that appellee drank beer while driving with KS in the car; that he had multiple girlfriends during the pendency of the divorce; and that he saw the children "about twice" during a six-month period in 2006. On January 22, 2008, the circuit court entered a divorce decree in which the court expressed that it was "gravely concerned about the morality of both parties" but awarded joint legal custody and directed primary physical custody to appellee. From this order, appellant brings her appeal.

Appellant argues that the circuit court erred in granting custody to appellee. Appellant contends that the circuit court's decision was contrary to the evidence and to the best interest of the children. Furthermore, appellant claims that the circuit court erred in failing to apply a material-change-of-circumstances test before awarding custody to appellee.

Our standard of review in custody cases is to consider the evidence *de novo*, but we will not reverse the circuit court's findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Harrison v. Harrison*, 102 Ark. App. 131, \_\_\_\_ S.W.3d \_\_\_\_ (2008). We give due deference to the superior position of the circuit court to view and judge the credibility of the witnesses. *Id.* This deference to the circuit court is even greater in cases involving child custody, as a heavier burden is placed on the circuit court to utilize to the

fullest extent its powers of perception in evaluating the witnesses, their testimony, and the best interest of the children. *Id.* Our law is well settled that the primary consideration in child-custody cases is the welfare and best interest of the children; all other considerations are secondary. *Id.*

With the applicable standard of review in mind, we turn to the present case. Here, the circuit court heard the following testimony in considering the best interests of the children. First, Linda Smith, KS's first-grade teacher, testified that, while KS was in the temporary custody of appellant, KS missed 48.5 days in one school year. Second, appellant testified that she did not know how many criminal charges were filed against her, saying, "There are several. Too many." In fact, Officer Robinson testified that she had "several encounters" with appellant, that outstanding warrants existed against her, and that she would be taken into custody on the day of the hearing for additional charges. Third, the circuit court received into evidence several photographs, which revealed the poor condition of appellant's home littered with clothes, food, and trash. Fourth, the circuit court heard how appellant exposed the children to her provocative behavior and photographs. One photograph introduced into evidence showed appellant posing in lingerie with one of the children in the background.

In child-custody cases, we have stated that it was for the circuit court to decide which parent would serve the children's best interest. *Harrison, supra*. As we have observed, a circuit court cannot always provide flawless solutions, especially when only limited options are available. *Respalie v. Respalie*, 25 Ark. App. 254, 756 S.W.2d 928 (1988). We recognize that the circuit court admitted concern about the morality of both parties; however, we defer to

its superior position to judge credibility. See *Judkins v. Duvall*, 97 Ark. App. 260, 248 S.W.3d 492 (2007). In this case, the circuit court gave weight to the testimony supporting an award of custody to appellee, and we simply cannot say that the circuit court's decision was clearly erroneous.

On appeal, appellant also urges us to consider whether the circuit court erred in declining to apply the material-change-in-circumstances test before awarding custody. We agree that, as a general rule, the party seeking a modification of a previous child-custody order has the burden of showing a material change in circumstances sufficient to warrant a change of custody. See *Hollinger v. Hollinger*, 65 Ark. App. 110, 986 S.W.2d 105 (1999). However, this is so only when the previous order is final, and it is error for the circuit court to require a material change in circumstances where there has been no prior final decree or final adjudication of custody. See *Fitzgerald v. Fitzgerald*, 63 Ark. App. 254, 976 S.W.2d 956 (1998). Here, the agreed temporary order was not a final decree or a final adjudication of custody, and as a result, the circuit court was not required to find a material change in circumstances before awarding custody to appellee.

Based upon the foregoing analysis and our well-established standard of review, we hold that it was not clearly erroneous for the circuit court to award custody to appellee. Accordingly, we affirm.

Affirmed.

GLADWIN and BAKER, JJ., agree.